



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 31, 1998

Mr. Robert F. Maxfield  
Legal Advisor  
Dallas County Sheriff's Department  
133 N. Industrial Boulevard  
Dallas, Texas 75207-4313

OR98-1811

Dear Mr. Maxfield:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117470.

The Dallas County Sheriff's Department (the "department") received a request for records relating to an investigation conducted by the department's Internal Affairs Division. You contend that most of the documents responsive to the request are excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You have not claimed any exceptions to disclosure for the documents under tabs 2, 3, 9, 74, 78-79, 86-87, and 89-92. Except for the photograph of the peace officer under tab 3, these documents must be released to the requestor. Except in limited circumstances that do not appear to apply to this case at this time, section 552.119(a) protects from disclosure "a photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure." A photograph that depicts a peace officer may be released only if the peace officer consents to the disclosure in writing. Gov't Code § 552.119(b). Thus, the department must withhold the photograph under tab 3 from disclosure unless the officer has given his written consent for its release.

You claim that the document under tab 1, which contains personnel data, is excepted from disclosure under section 552.101, in conjunction with Local Government Code section 157.904(h), and also sections 552.102 and 552.111. We will address these arguments in turn.

Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses confidentiality statutes. You contend that Local Government Code section 157.904(h) precludes the disclosure of the personnel data, unless the subject employee consents to the disclosure. Section 157.904 applies to the personnel records of a sheriff's department in a county with a population of 2,000,000 or more. Local Gov't Code § 157.904(a). Section 157.904(h) provides as follows:

The sheriff or the sheriff's designee may not release an employee record or other information contained in an employee's permanent personnel file without first obtaining the employee's written permission, *unless the release of the record or information is required by law.*

Local Gov't Code § 157.904(h) (emphasis added). Section 157.904(h) does not make information contained in personnel files confidential for purposes of the Open Records Act. *See* Open Records Decision No. 562 (1990) (finding that similar provision in chapter 143 of Local Government Code does make personnel information confidential). Section 157.904(h) merely requires that the consent of the subject employee be obtained when disclosure of information in the employee's personnel file is not required by the Open Records Act. In other words, information contained in files maintained under section 157.904 must be released unless it is covered by one of the exceptions to disclosure in the Open Records Act.

Section 552.102 excepts from disclosure information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is protected by the common-law right of privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The personnel information under tab 1 does not meet this test. *See* Open Records Decision Nos. 473 (1987) (public has legitimate interest in job performance of public employees), 470 (1987) (public employee's job performance does not generally constitute his private affairs). Therefore, we conclude that the department may not withhold the information from disclosure under section 552.102.

You also claim that the personnel information under tab 1 is excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the

agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency’s policymaking functions, however, do not encompass internal administrative or personnel matter; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. The personnel information under tab 1 is factual and administrative in nature and does not relate to the department’s policymaking function. Thus, we conclude that the information is not excepted from disclosure under section 552.111 and must be released.

You contend that all of the remaining documents are excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 (1990) at 4.

Two department employees have filed complaints of discrimination against the department with the Texas Commission on Human Rights (the “TCHR”). This office has ruled that a pending complaint before the Equal Employment Opportunity Commission (the “EEOC”) indicates a substantial likelihood of litigation relating to the complaint. Open Records Decision Nos. 386 (1983) at 2, 336 (1982) at 1. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction over complaints alleging employment discrimination to the TCHR. *Id.* We agree that the department reasonably anticipates litigation relating to the discrimination complaints and that the remaining documents relate to the anticipated litigation. Thus, we conclude that section 552.103(a) is applicable to the remaining documents.

In reaching this conclusion, however, we assume that the opposing parties in the anticipated litigation have not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, we note that some of the information in the remaining documents is confidential by law and must be withheld from disclosure even after section 552.103 no longer protects it from disclosure. For example, medical records are confidential under the Medical Practice Act, V.T.C.S. article 4495b, section 5.08, and may only be released in accordance with that statute. Additionally, the identities of victims of and witnesses to sexual harassment are protected by the common-law right to privacy. We urge the department to exercise caution in releasing this information to the public after its section 552.103 interest in the information expires.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/mjc

Ref: ID# 117470

Enclosures: Submitted documents

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